IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.336 OF 2007

1. M/s.Seema Silk and Sarees
   Partnership firm, &
2. Shiv Kumar Gupta. ..Petitioners.

Versus

1. The Directorate of Enforcement,
2. The Union of India,
3. The Reserve Bank of India, &
4. The State of Maharashtra. ..Respondents.

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Mr.Mathews Nedumpara, Adv. i/b. Mahesh M. Thorat, Adv. for the Petitioners.

Mr.D.N.Salvi, Adv. for Respondent No.1.

Mrs.V.R.Bhosale, APP, for the State.

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CORAM : R.M.S.KHANDEPARKAR AND SMT.V.K.TAHILRAMANI,JJ.

DATED : 30TH JULY, 2007.

P.C.:-

. Heard.

2. By the present Petition, the petitioner is seeking to challenge the constitutionality of

the provisions of law comprised under Section 18 and Section 56 of Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the FERA) being violative of Articles 14, 19, 20 and 21 of the Constitution of India, and further to quash the order dated 14th February, 2003 passed by the Appellate Tribunal for FERA and also to quash the criminal complaint pending against the petitioner in CC No.1234/S/2002 as also to quash the order passed by the Metropolitan Magistrate rejecting the application filed by the petitioner for discharge in such proceedings.

3. We have heard at length the learned Advocate for the petitioners in the matter. We have also perused the Petition and the annexures thereto.

4. The challenge as regards the constitutionality of the provisions of law comprised in Section 18 of the FERA, it is restricted to sub-sections (2) & (3) thereof.

5. Section 18(2) & (3) of the FERA read thus

:-

18. Payment for exported goods.-

(1) .....

(2) Where any export of goods, to which a notification under clause (a) of sub-section (1) applies, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing --

(A) in a case falling under sub-clause (i) or sub-clause (ii) of clause (a) of sub-section (1), --

(a) that payment for the goods-

(i) is made otherwise than in

the prescribed manner, or

(ii) is delayed beyond the period prescribed under clause (a) of sub-section (1), or

(b) that the proceeds of sale of the goods exported do not represent the full export value of the goods subject to such deductions, if any, as may be allowed by the Reserve Bank, and

(B) in a case falling under sub-clause (ii) of clause (a) of sub-section (1), also that the sale of the goods is delayed to an extent which is unreasonable having regard to the ordinary course of trade :

Provided that no proceedings in respect of any contravention of the provisions of this sub-section shall be instituted unless the prescribed

period has expired and payment for the goods representing the full export value has not been made in the prescribed manner within the prescribed period.

(3) Where in relation to any goods to which a notification under clause (a) of sub-section (1) applies the prescribed period has expired and payment therefor has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of sub-section (2).

6. It is sought to be contended on behalf of

the petitioners that the respondents are acting unfairly in making classification between the traders who sell the goods in the domestic market and the exporters. For a trader selling the goods in the domestic market is free to sell on credit and even if he is not able to recover the total price of the goods sold on credit or part thereof, his case is sympathetically considered on the basis of the accounting principles and also does not face any penalty, whereas in case of exporters there is a presumption which is sought to be incorporated under sub-section (3) of Section 18 that unless the contrary is proved the trader is deemed to have failed to take all the reasonable steps to recover the price of the goods so sold on credit and on that count is sought to be penalised. This is sought to be argued as being contrary to the accounting principles and virtually amounts to presumption that all the exporters are cheaters. This clearly amounts to illegal discrimination and violates the fundamental right of the traders engaged in export business. According to the Advocate for the petitioners

there is no law which permits the Government or the parliament to presume that the trader will not do anything to recover the amount in relation to the goods sold on credit and to incorporate any presumption to that effect in the statutory provisions as it amounts to denying the fundamental right to business of the traders engaged in export of goods. It was further sought to be contended on behalf of the petitioners that the defect in the statutory provisions under Section 18(3) was realised by the Government and the same is reflected from the provisions of law comprised in the FEMA and various circulars issued by the RBI in exercise of statutory powers under the FEMA, 1999 and in that regard attention was sought to be drawn to circular dated 1st July, 2005.

7. Having heard the learned Advocate for the petitioners and on perusal of the Petition and the annexures thereto the challenge is essentially on the ground of discrimination between the traders in the domestic market vis-a-vis the traders engaged in export

business. Undoubtedly Section 18(3) of the FERA clearly provides that unless it is proved by the exporters that he has taken all reasonable steps to recover the payments of the goods sold on credit, there would be presumption to the effect that he had failed to take such reasonable steps for the recovery thereof. It is however to be noted that sub-section (3) of Section 18 relates to the goods to which notification under clause (a) of sub-Section (1) applies. Sub-section (1)(a) of Section 18 provides that the Central Government may, by notification in the Official Gazette, prohibit the taking or sending out by land, sea or air of all goods or of any goods or class of goods specified in the notification from India directly or indirectly to any place so specified unless the exporter furnishes to the prescribed authority a declaration in the prescribed form supported by such evidence as may be prescribed or so specified and true in all material particulars which, among others, shall include the amount representing - (i) the full export value of the goods; or (ii) if the full export value of the goods is not

ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in the overseas market; and affirms in the said declaration that the full export value of the goods (whether ascertainable at the time of export or not) has been, or will within the prescribed period be, paid in the prescribed manner. It is pertinent to note that during the lengthy arguments sought to be canvassed on behalf of the petitioners, the learned Advocate has not been able to find fault in any manner with Section 18(1)(a) of the FERA. The said Section gives ample room to the businessmen to make necessary adjustments in relation to the amount which is expected to be recovered on account of export of the goods. In other words, while making the necessary provisions regarding the presumption under Section 18(3) the legislature has taken due care about the difficulties which a exporter may face in normal condition to recover the amount of the goods to be exported and sold out side the country. In other words, the provisions

comprised under sub-section (3) of Section 18 of the FERA regarding the presumption can by no stretch of imagination be said to be unreasonable.

8. As regards the contention regarding the discriminatory treatment to the exporters vis-a-vis domestic traders is concerned, the said contention is devoid of substance as the traders in domestic market cannot be classified in the same class as the exporters They are classified in two different classes. Therefore the very contention about discrimination falls flat to ground.

9. As regards the contention that the discrimination sought to be made within the domestic traders and the exporters in relation to such presumption is concerned, apart from the fact that the two do not fall in the same class, it was also sought to be contended that benefit which is made available in terms of accounting principles to the domestic traders is denied to the exporters. At the outset it is to be noted

that there are no specific pleadings in that regard nor any supporting material placed along with the Petition for adjudication of this aspect of the matter. However, even *prima facie* the learned Advocate for the petitioners has not been able to satisfy us on this aspect. The provisions of Section 18 are essentially in relation to the goods exported to the foreign countries. They are not in relation to the goods which are subjected to trade in domestic market. Being so, the question of claiming the benefit of applicability of accounting principles which is applicable to the trade and business in the domestic market cannot be sought to be applied plainly to the international business on the international level. There are bound to be appropriate and reasonable differences in that regard which have to be considered bearing in mind the economic policy of the country as well as various other measures which are required to be taken for efficient governance of the country’s economy. Any ground to challenge the statutory provisions sought to canvassed must have proper foundation led in the

Petition and in the absence thereof, question of entertaining such challenge on any such ground does not arise.

10. As no other ground is sought to be canvassed to challenge the vires of Section 18(2)& 18(3) of the FERA, we do not find any substance in that challenge in the matter.

11. As regards the challenge to the adjudication order dated 14th February, 2003, undisputedly the order passed by the Appellate Tribunal has been challenged by the Enforcement Directorate and the matter is pending before this Court in First Appeal in that regard. Being so, keeping all the issues which are available to the petitioners in that regard open to be decided in the said Appeal, it is not necessary to deal with the said aspect of the matter in this Petition. We make it clear that we have not expressed any opinion in that regard and all the issues in respect of said proceedings are kept open to be decided in the said Appeal.

12. As regards the challenge to the order passed by the Metropolitan Magistrate rejecting the application for discharge, the learned Advocate for respondent has brought to our notice a decision of the Supreme Court in the matter of **Standard Chartered Bank and others Vs. Directorate of Enforcement and others** (Civil Appeal No.1748 of 1999 dated 24th February, 2006) wherein it was clearly ruled that there is nothing in the FERA to indicate that a finding in an adjudication is binding on Court in prosecution under Section 56 of the FERA and there is no indication that the prosecution depends upon the result of the adjudication. Para-22 of the said decision reads thus :-

> "22. Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of a

contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing in the Act to indicate that a finding in an adjudication, is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned senior counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act. The decision in **K.C.Builders and another** vs. **Assistant Commissioner of Income Tax**

(2004 (2) SCC 731) is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it was settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and separate.

> Hence, the ratio of the above decision is not applicable. That apart there is merit in the submission of the learned Additional Solicitor General that the correctness of the view taken in **K.C. Builders** (supra) may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in **Assistant Collector of Customs, Bombay** vs. **L.R. Melwani and another** (supra) and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here."

. In view of the above decision of the Apex Court in the matter, there is absolutely no substance in the contention sought to be raised in relation to the order passed by the Metropolitan Magistrate rejecting discharge application.

13. For the reasons stated above, there is no substance in the grievance made by the petitioners either in relation to the constitutionality of the provisions of law comprised under Section 18 and Section 56 of the FERA as also in relation to the order passed by the Metropolitan Magistrate. As regards the adjudication proceedings, the matter is being dealt in Appeal pending before this Court and all the issues in that respect are kept open. In view of this, the Petition fails and is rejected with costs.

14. On pronouncement of the order, the learned Advocate for the petitioners sought leave to file appeal. In our considered opinion in the absence of any question of public importance being disclosed or a question which would require adjudication by the Apex Court in the matter, there is no case made out for grant of leave. Request for leave rejected.

[R.M.S.KHANDEPARKAR,J.]

[SMT.V.K.TAHILRAMANI,J.]